

OLAN D. WILLIAMS,)
)
 Plaintiff,) No. CV-08-3075-CI
)
 v.) ORDER DENYING PLAINTIFF'S
) MOTION FOR SUMMARY JUDGMENT
) AND GRANTING DEFENDANT'S
 MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
 of Social Security,)
)
 Defendant.)
)

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 17, 22.) Attorney D. James Tree represents Olan D. Williams (Plaintiff); Special Assistant United States Attorney Mathew W. Pile represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment, and directs entry of judgment for Defendant.

Plaintiff filed for disability insurance benefits (DIB) on June 8, 2005. (Tr. 74-78.) He alleged disability due to retinal artery occlusion in his right eye, stroke causing left homonymous hemianopia, and thyroid condition, with an alleged onset date of February 16, 2005. (Tr. 74, 90.) His claim was denied initially and on reconsideration. (Tr. 62, 55.) Plaintiff requested a hearing before an administrative law judge (ALJ), which was held on

1 July 17, 2008, before ALJ Richard Say. (Tr. 42, 441-74.) Plaintiff,
2 who was represented by counsel, and vocational expert Gary Jesky
3 (VE) testified. (Tr. 442.) Sandra Lemley, lay witness and a friend
4 of Plaintiff's, also testified. (*Id.*) The ALJ denied benefits in
5 a decision dated June 25, 2008¹ (Tr. 12-19) and the Appeals Council
6 denied review. (Tr. 4-6.) The instant matter is before this court
7 pursuant to 42 U.S.C. § 405(g).

8 **STATEMENT OF THE CASE**

9 The facts of the case are set forth in detail in the transcript
10 of proceedings and are briefly summarized here. At the time of the
11 hearing, Plaintiff was 45 years old. (Tr. 447.) He testified he
12 was enrolled in school until tenth grade, but only attended classes
13 through sixth grade. He did not obtain a high school equivalency
14 degree. (Tr. 447-48.) He was unmarried and lived in a modular home
15 with Sandra Lemley, his significant other and his teenage daughter.
16 (Tr. 449.) He stated his daughter and Ms. Lemley helped him with
17 activities of daily living, and he sometimes did household chores.
18 (Tr. 453.) Plaintiff had work history as a garbage truck driver for
19 15 years. (Tr. 91.) He suffered a back injury in 2000, for which
20 he had surgery, and returned to work until 2005, when he had a
21 stroke. (Tr. 449-50.) He testified he could no longer work due to
22 vision problems, back and breathing problems. (Tr. 451.) Plaintiff
23 stated he had not sought treatment for his breathing problems and
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25 ¹ The ALJ's decision was dated June 25, 2008, as the result of
26 a clerical error. (Tr. 19.) The ALJ's decision, which discusses
27 vocational expert testimony taken at the July 17, 2008, was in fact
28 rendered on July 25, 2008.

1 continued to smoke. (Tr. 452.)

2 **ADMINISTRATIVE DECISION**

3 At step one, ALJ Say found Plaintiff had not engaged in
4 substantial gainful activity since the alleged onset date. (Tr.
5 14.) At step two, he found Plaintiff had severe impairments of
6 "obesity; degenerative disc disease in his lumbar spine, status post
7 laminectomy, post cardiovascular accident and stenting with vision
8 loss." (*Id.*) He found symptoms and complaints of depression,
9 anxiety, hypertension, sleep apnea, and shortness of breath also
10 appeared in the record, but in combination and alone these medically
11 determinable impairments were not severe. (*Id.*) At step three, ALJ
12 Say determined the impairments, alone and in combination, did not
13 meet or medically equal one of the listed impairments in 20 C.F.R.,
14 Pt. 404, Subpt. P, Appendix 1 (Listings). (*Id.*) He found
15 Plaintiff's statements regarding his symptoms and limitations were
16 "not credible to the extent they are inconsistent with the residual
17 functional capacity assessment." (Tr. 16.) At step four, he
18 determined Plaintiff had the residual functional capacity (RFC) to
19 perform sedentary level work, with the following non-exertional
20 limitations:

21 He is able to perform simple reading, writing and
22 arithmetic. He can occasionally stoop, crouch, crawl and
23 kneel. He can occasionally climb ramps and stairs, but
24 should avoid ladders. Reduced visual acuity in his right
eye limits his depth perception and peripheral vision in
his left eye is also limited. He is restricted to driving
an automobile during daytime hours.

25 (Tr. 15.)

26 Based on this RFC and VE testimony, the ALJ found Plaintiff was
27 unable to perform his past work as a garbage/recycling truck driver.

1 (Tr. 17.) Proceeding to step five, ALJ Say determined Plaintiff was
2 able to perform other jobs that existed in significant numbers in
3 the national economy, such as packing line worker and small products
4 assembler. (Tr. 18.) He concluded Plaintiff was not under a
5 "disability" as defined by the Social Security Act at any time
6 through the date of his decision. (*Id.*)

7 STANDARD OF REVIEW

8 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
9 court set out the standard of review:

10 A district court's order upholding the Commissioner's
11 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
12 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
13 Commissioner may be reversed only if it is not supported
14 by substantial evidence or if it is based on legal error.
15 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
16 Substantial evidence is defined as being more than a mere
17 scintilla, but less than a preponderance. *Id.* at 1098.
18 Put another way, substantial evidence is such relevant
19 evidence as a reasonable mind might accept as adequate to
20 support a conclusion. *Richardson v. Perales*, 402 U.S.
21 389, 401 (1971). If the evidence is susceptible to more
22 than one rational interpretation, the court may not
23 substitute its judgment for that of the Commissioner.
24 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*
25 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

26 The ALJ is responsible for determining credibility,
27 resolving conflicts in medical testimony, and resolving
28 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
Cir. 1995). The ALJ's determinations of law are reviewed
de novo, although deference is owed to a reasonable
construction of the applicable statutes. *McNatt v. Apfel*,
201 F.3d 1084, 1087 (9th Cir. 2000).

23 SEQUENTIAL PROCESS

24 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
25 requirements necessary to establish disability:

26 Under the Social Security Act, individuals who are
27 "under a disability" are eligible to receive benefits. 42
28 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
medically determinable physical or mental impairment"

1 which prevents one from engaging "in any substantial
2 gainful activity" and is expected to result in death or
3 last "for a continuous period of not less than 12 months."
4 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
5 from "anatomical, physiological, or psychological
6 abnormalities which are demonstrable by medically
7 acceptable clinical and laboratory diagnostic techniques."
8 42 U.S.C. § 423(d)(3). The Act also provides that a
9 claimant will be eligible for benefits only if his
10 impairments "are of such severity that he is not only
11 unable to do his previous work but cannot, considering his
12 age, education and work experience, engage in any other
13 kind of substantial gainful work which exists in the
14 national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,
15 the definition of disability consists of both medical and
16 vocational components.

17 In evaluating whether a claimant suffers from a
18 disability, an ALJ must apply a five-step sequential
19 inquiry addressing both components of the definition,
20 until a question is answered affirmatively or negatively
21 in such a way that an ultimate determination can be made.
22 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
23 claimant bears the burden of proving that [s]he is
24 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
25 1999). This requires the presentation of "complete and
26 detailed objective medical reports of h[is] condition from
27 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
28 404.1512(a)-(b), 404.1513(d)).

1 It is the role of the trier of fact, not this court, to resolve
2 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
3 supports more than one rational interpretation, the court may not
4 substitute its judgment for that of the Commissioner. *Tackett*, 180
5 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
6 Nevertheless, a decision supported by substantial evidence will
7 still be set aside if the proper legal standards were not applied in
8 weighing the evidence and making the decision. *Browner v. Secretary*
9 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
10 there is substantial evidence to support the administrative
11 findings, or if there is conflicting evidence that will support a
12 finding of either disability or non-disability, the finding of the

1 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
2 1230 (9th Cir. 1987).

3 ISSUES

4 The question is whether the ALJ's decision is supported by
5 substantial evidence and free of legal error. Plaintiff argues the
6 ALJ erred when he: (1) rejected mental health impairments and his
7 sleep disorder at step two; (2) failed to develop the record further
8 at step two; (3) improperly rejected the opinions of treating and
9 examining medical providers; (4) improperly rejected his testimony
10 and lay witness testimony; and (4) failed to meet the Commissioner's
11 burden at step five. (Ct. Rec. 18 at 9-10.)

12 DISCUSSION

13 A. Credibility

14 Plaintiff argues the ALJ failed to give specific, "clear and
15 convincing" reasons for discounting his testimony, and the testimony
16 of Sandra Lemley, his significant other. (Ct. Rec. 18 at 16-19.)
17 When a claimant's statements as to the severity of impairments, pain
18 and limitations are found not credible, the ALJ must set forth
19 findings sufficiently specific to permit the court to conclude the
20 ALJ did not arbitrarily discredit claimant's allegations. *Thomas v.*
21 *Barnhart*, 278 F.3d 947, 958-959 (9th Cir. 2002); *Bunnell v. Sullivan*,
22 947 F.2d 341, 345-46 (9th Cir. 1991) (en banc). It is well-settled,
23 however, that an ALJ cannot be required to believe every allegation
24 of disabling pain, even when medical evidence exists that a
25 claimant's condition may produce pain. "Many medical conditions
26 produce pain not severe enough to preclude gainful employment."
27 *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). Although an
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1 adjudicator may not reject a claimant's extreme symptom complaints
2 solely on a lack of objective medical evidence, medical evidence is
3 a relevant factor to consider. *Social Security Ruling (SSR)* 96-7p.

4 If there is no affirmative evidence that the claimant is
5 malingering, the ALJ must provide "clear and convincing" reasons for
6 rejecting the claimant's allegations regarding the severity of
7 symptoms. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). The
8 ALJ engages in a two-step analysis in deciding whether to admit a
9 claimant's subjective symptom testimony. *Lingenfelter v. Astrue*, 504
10 F.3d 1028, 1035-36 (9th Cir. 2007); *Smolen v. Chater*, 80 F.3d 1273,
11 1281 (9th Cir. 1996). Under the first step, the ALJ must find the
12 claimant has produced objective medical evidence of an underlying
13 "impairment," and that the impairment, or combination of
14 impairments, could reasonably be expected to cause "some degree of
15 the symptom." *Lingenfelter*, 504 F.3d at 1036. Once the first test
16 is met, the ALJ must evaluate the credibility of the claimant and
17 make specific findings supported by "clear and convincing" reasons.
18 *Id.*

19 In addition to ordinary techniques of credibility evaluation,
20 the ALJ may consider the following factors when weighing the
21 claimant's credibility: the claimant's reputation for truthfulness;
22 inconsistencies either in his allegations of limitations or between
23 his statements and conduct; daily activities and work record; and
24 testimony from physicians and third parties concerning the nature,
25 severity, and effect of the alleged symptoms. *Light v. Social Sec.*
26 *Admin.*, 119 F.3d 789, 792 (9th Cir. 1997); *Fair*, 885 F.2d at 597
27 n.5. The ALJ may also consider an unexplained failure to follow
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1 treatment recommendations and testimony by the claimant "that
2 appears less than candid." *Tommasetti v. Astrue*, 533 F.3d 1035,
3 1039 (9th Cir. 2008). As explained by the Commissioner in his policy
4 ruling, the ALJ need not totally reject a claimant's statements; he
5 may find the claimant's statements about pain to be credible to a
6 certain degree, but discount statements based on his interpretation
7 of evidence in the record as a whole. SSR 96-7p. "For example, an
8 adjudicator may find credible an individual's statement as to the
9 extent of the functional limitations or restrictions due to
10 symptoms; i.e., that the individual's abilities to lift and carry
11 are compromised, but not to the degree alleged." *Id.* If the ALJ's
12 credibility finding is supported by substantial evidence in the
13 record, "the court may not engage in second-guessing." *Thomas*, 278
14 F.3d at 959; *Fair*, 885 F.2d at 604 ("credibility determinations are
15 the province of the ALJ").

16 Here, there is no evidence of malingering. In explaining his
17 basis for the RFC determination, the ALJ summarized Plaintiff's
18 testimony, and found Plaintiff's functional limitations were not as
19 limiting as alleged. He did not reject all of Plaintiff's
20 complaints, and specifically noted he had given a fair amount of
21 weight to Plaintiff's testimony regarding his exertional and visual
22 limitations. (Tr. 17.) To support his credibility finding, the ALJ
23 cited evidence of "relatively normal daily activities" that
24 Plaintiff described, including chores, laundry, some yard work,
25 driving, shopping, recreational fishing, socializing with his
26 family, and attending to finances and hygiene. (Tr. 16, 453-57.)
27 Consideration of these daily activities is acceptable in assessing
28 the severity of alleged symptoms. 20 C.F.R. § 404.1529(c)(3);

1 *Tommasetti*, 533 F.3d at 1039. Although Plaintiff may not agree that
2 his daily activities are "normal," the record reasonably supports
3 the ALJ's conclusion that Plaintiff's self-reported daily activities
4 are consistent with an ability to perform the sedentary work
5 identified.

6 The ALJ also found objective medical reports, non-compliance
7 with recommended treatment, and conservative treatment received
8 since the alleged onset date did not support the degree of
9 limitations alleged. (Tr. 16; see also Tr. 156, 160, 408, 413, 416,
10 431.) These also are "clear and convincing" reasons to discount
11 symptom testimony. *Tommasetti*, 533 F.3d at 1039; *Parra v. Astrue*,
12 481 F.3d 742, 750-51 (9th Cir. 2007). Plaintiff's objection to the
13 ALJ's finding that his failure to stop smoking impugns his
14 credibility is without merit. Case law is clear that failure to
15 follow prescribed medical treatment (where treatment might relieve
16 a complaint) is a basis for finding complaints "unjustified or
17 exaggerated." *Orn v. Astrue*, 495 F.3d 625, 638 (9th Cir. 2007)
18 (citing *Fair*, 885 F.2d at 603); see also *Tommasetti*, 533 F.3d at
19 1041 (finding a lack of aggressive treatment program permissible to
20 support adverse credibility finding); *Parra*, 481 F.3d at 750-51
21 (conservative treatment inconsistent with allegations of severe
22 pain); *Thomas*, 278 F.3d at 959; *Smolen*, 80 F.3d at 1284. In
23 addition, the ALJ specifically linked Plaintiff's failure to stop
24 smoking as a reason to discount his complaints of breathing. (Tr.
25 413); see *Orn*, *supra*, at 638.

26 The ALJ rationally interpreted the evidence and articulated
27 "clear and convincing" reasons for discounting the severity of
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1 symptoms alleged. Substantial evidence reasonably supports the
2 ALJ's determination that Plaintiff's symptoms are not as severe as
3 alleged, and do not preclude sedentary work with the non-exertional
4 limitations assessed.

5 **B. Lay Witness Testimony**

6 Plaintiff argues the ALJ improperly discounted Ms. Lemley's
7 testimony describing the severity of his limitations. Ms. Lemley
8 and Plaintiff's daughter live with Plaintiff, and according to Ms.
9 Lemley, she is the mother of Plaintiff's daughter. (Tr. 461.) She
10 testified that Plaintiff had difficulties cooking because of his
11 eyesight, tired easily when mowing the lawn, and was very depressed
12 with high anxiety. (Tr. 462-64.) Under the Regulations, Ms.
13 Lemley's lay testimony is considered non-medical "other source"
14 evidence. 20 C.F.R. § 404.1527(d); SSR 06-03p. Although the ALJ is
15 required to "consider observations by non-medical sources as to how
16 an impairment affects a claimant's ability to work," *Sprague*, 812
17 F.2d at 1232, lay testimony alone can never establish disability.
18 *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). Nonetheless,
19 an ALJ cannot disregard lay testimony without comment; the ALJ must
20 give specific reasons "germane" to a lay witness's testimony before
21 discounting it. *Bruce v. Astrue*, 557 F.3d 1113, 1115 (9th Cir.
22 2009); *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993). In his
23 policy ruling the Commissioner has noted that the Regulations do not
24 provide explicit guidance on the evaluation of "other source"
25 evidence. To assist adjudicators, he has identified certain factors
26 that should be considered by the adjudicator in evaluating opinions
27 of non-medical sources such as friends and relatives, e.g., the

1 nature and extent of the relationship; whether the evidence is
2 consistent with other evidence; and other factors that tend to
3 support or refute the opinion. SSR 06-03p.

4 Here, the ALJ did not disregard Ms. Lemley's testimony. (Tr.
5 17.) He specifically addressed her observations, and gave them
6 little weight because they were (1) not consistent with Plaintiff's
7 conservative treatment history, and (2) not consistent with
8 Plaintiff's reported daily activities. These are specific reasons,
9 germane to Ms. Lemley, sufficient to discount her non-medical lay
10 testimony. In explaining the weight given to the testimony, the ALJ
11 also noted Ms. Lemley did not have the expertise to give an
12 objective functional assessment, and her personal relationship might
13 affect the objectivity of her observations. (Tr. 17.) Citing to a
14 close, personal relationship, standing alone, would be unhelpful in
15 evaluating credibility, but is a relevant factor to consider in
16 discussing lay testimony, where, as here, there are other reasons.
17 See *Greger v. Barnhart*, 464 F.3d 968, 972 (9th Cir. 2006); SSR 06-
18 03p.

19 Plaintiff's contention that the ALJ erroneously rejected Ms.
20 Lemley's testimony because it was "not supported by the medical
21 evidence" is inaccurate. (Ct. Rec. 18 at 18.) The ALJ noted Ms.
22 Lemley's report of Plaintiff's difficulties were "not consistent
23 with the claimant's conservative treatment history," i.e., the
24 medical relief he sought and/or received for the alleged
25 difficulties. (Tr. 17.) This finding is supported by the
26 evidence. For example, Ms. Lemley stated Plaintiff has difficulties
27 with depression and anxiety, but the record does not reflect
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1 significant complaints or treatment for these conditions. Although
2 the ALJ did not discuss these inconsistencies in the context of his
3 consideration of Ms. Lemley's testimony, Plaintiff's conservative,
4 routine treatment history is discussed throughout the decision, and
5 the court may draw inferences from the ALJ's opinion. See
6 *Magallanes v. Bowen*, 881 F.2d 747, 755 (9th Cir. 1989). The evidence
7 in its entirety reasonably supports the ALJ's findings giving little
8 weight to Ms. Lemley's testimony.

9 **C. Step Two: Non-Severe Impairments**

10 Plaintiff argues the ALJ erred when he rejected mental health
11 and sleep impairments as "frivolous." (Ct. Rec. 18 at 13.) This
12 characterization of the ALJ's finding, however, is inaccurate. It
13 is noted on independent review that the ALJ's step two findings do
14 not include reference to "frivolous" complaints. (See Tr. 14.)
15 Rather, the ALJ identified other medical conditions appearing in the
16 record and determined these impairments, "considered singly or
17 together, have caused transient and mild symptoms and limitations,
18 are well controlled with treatment, have persisted for less than
19 twelve consecutive months or are otherwise not adequately supported
20 by the medical evidence in the record." (*Id.*) These findings
21 comport with provisions of the Social Security Administration
22 regulations (Regulations) which describe a severe impairment as a
23 medically determinable impairment that "significantly limits" a
24 claimant's physical or mental ability to do basic work activities,
25 and meets the duration requirement. 20 C.F.R. §§ 404.1520(a)(4)(ii)
26 and (c), .1509. The fact that an adjudicator determines medical
27 conditions in the record do not fall within this regulatory
28 definition does not mean he determined a claimant's complaints are

1 "frivolous," as suggested by Plaintiff. Further, the fact that a
2 medically determinable condition exists does not automatically mean
3 the symptoms are "severe," or "disabling" as defined by the
4 Regulations. See, e.g., *Young v. Sullivan*, 911 F.2d 180, 181 (9th
5 Cir. 1990); *Fair*, 885 F.2d at 603; *Key v. Heckler*, 754 F.2d 1545,
6 1549-50 (9th Cir. 1985).

7 To satisfy step two's requirement of a severe impairment, the
8 claimant must prove the existence of a physical or mental impairment
9 by providing medical evidence consisting of signs, symptoms, and
10 laboratory findings; the claimant's own statement of symptoms alone
11 will not suffice. 20 C.F.R. § 404.1508. In addition, the
12 Commissioner has passed policy rulings which guide dismissal of
13 claims at step two.² Those rulings state an impairment may be found
14 to be not severe when "medical evidence establishes only a slight
15 abnormality or a combination of slight abnormalities which would
16 have no more than a minimal effect on an individual's ability to
17 work." SSR 85-28. "The severity requirement cannot be satisfied
18 when medical evidence shows that the person has the ability to
19 perform basic work activities, as required in most jobs." Basic

20 _____
21 ² Social Security Rulings are issued to clarify the Regulations
22 and policy. They are not published in the federal register and do
23 not have the force of law. However, "deference" is given to the
24 Commissioner's interpretation of the Regulations. *Ukolov v.*
25 *Barnhart*, 420 F.3d 1002 n.2 (9th Cir. 2005); *Bunnell v. Sullivan*, 947
26 F.2d 341 n.3. (9th Cir. 1991). The Supreme Court upheld the validity
27 of the Commissioner's severity regulation, as clarified in SSR 85-
28 28, in *Bowen v. Yuckert*, 482 U.S. 137, 153-154 (1987).

1 work activities include: "walking, standing, sitting, lifting,
2 pushing, pulling, reaching, carrying, or handling; seeing, hearing,
3 speaking; understanding, carrying out and remembering simple
4 instructions; responding appropriately to supervision, coworkers,
5 and usual work situation." *Id.* As explained by the Commissioner,
6 "medical evidence alone" is evaluated to assess the effects of
7 medically determinable impairments on a claimant's ability to
8 perform basic work activities. *Id.*

9 **1. Mental Impairments**

10 At step two, the ALJ noted references in the record to
11 depression and anxiety, and found the medical evidence did not
12 support a finding that these problems caused more than mild
13 limitations. He also found the impairments were controlled with
14 medication, or did not meet the duration requirement. (Tr. 14.)
15 Plaintiff argues this was error because the ALJ's only explanation
16 was that medical evidence did not show severity.³ This argument is
17 unpersuasive because (1) as cited above, other reasons, which are
18 supported by the record, were given, and (2) a lack of objective
19 medical evidence is an appropriate reason to find non-severity. 20
20 C.F.R. § 404.1508 (objective medical evidence required to establish
21 severity).

22 Citing *Brown v. Heckler*, 713 F.2d 441 (9th Cir. 1983), Plaintiff

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24 ³ A mental impairment generally is considered not severe if the
25 degree of limitation in the three functional areas of activities of
26 daily living, social functioning, and concentration, persistence or
27 pace is rated as "none" or "mild" and there have been no episodes of
28 decompensation. 20 C.F.R. § 404.1520a(d)(1).

1 asserts the ALJ had a duty to develop the record to ascertain
2 severity. (Ct. Rec. 18 at 13.) Plaintiff's reliance on *Brown* is
3 misplaced. In *Brown*, the claimant was appealing the termination of
4 his disability benefits. As explained by the *Brown* court, although
5 the claimant has the burden of establishing a continuing disability
6 in a termination case, the ALJ has the burden to rebut a presumption
7 that "the [disabling] condition still exists," by coming forward
8 with evidence that the claimant's condition has changed. *Id.* at 442
9 (*citations omitted.*) The court held that in terminating the
10 claimant's benefits without a hearing, the ALJ had failed to assume
11 his duty to develop the record with evidence to rebut the
12 presumption. The case was remanded for consideration of evidence of
13 a changed condition and a hearing to take the claimant's oral
14 testimony. *Id.* at 443.

15 The case on review here is a proceeding to establish
16 disability, in which the burden of proof is on the claimant to prove
17 the existence of a severe physical or mental impairment by providing
18 medical evidence consisting of signs, symptoms, and laboratory
19 findings; the claimant's own statement of symptoms alone will not
20 suffice. 20 C.F.R. §§ 404.1508. Once medical evidence is provided
21 by the claimant, the Regulations state the agency "will develop your
22 complete medical history for at least the 12 months preceding the
23 month in which you file your application unless there is a reason to
24 believe that development of an earlier period is necessary." 20
25 C.F.R. § 404.1512 (d). The ALJ's duty to develop the record
26 further is triggered "only when there is ambiguous evidence or when
27 the record is inadequate for proper evaluation of evidence." *Mayes*
28 *v. Massanari*, 276 F.3d 453, 4509-60 (9th Cir. 2001) (*citing*

1 *Tonapetyan v. Halter*), 242 F.3d 1144, 1150 (9th Cir. 2001)). Also,
2 before that duty is triggered, there must be sufficient objective
3 evidence in the record to suggest the "existence of a condition
4 which could have a material impact on the disability decision."
5 *Hawkins v. Chater*, 113 F.3d 1162, 1167 (10th Cir. 1997). "Isolated
6 and unsupported comments by the claimant are insufficient, by
7 themselves, to raise the suspicion of the existence of a
8 nonexertional impairment." *Id.* Further, in determining if a
9 claimant is disabled, the ALJ is only required to seek additional
10 evidence if the evidence already present consistently favors the
11 claimant. *Lewis v. Apfel*, 236 F.3d 503, 514-15 (9th Cir. 2001).

12 Here, the record includes medical history from 2000, over four
13 years preceding Plaintiff's application through February 2008. (See
14 Tr. 286-364, 400-07.) The ALJ does not indicate the record was
15 insufficient to evaluate the medical evidence presented. Plaintiff
16 does not explain what ambiguity or inadequacy exists in the medical
17 records presented that would trigger further development. Instead
18 he relies on his own testimony and that of Ms. Lemley as a basis for
19 further development of the record. (Ct. Rec. 18 at 13.) However,
20 their unsupported comments are insufficient to establish a diagnosis
21 or trigger the ALJ's duty to obtain additional evidence.

22 Plaintiff's assertion that he has been "diagnosed" with
23 "significant" depression and anxiety (Ct. Rec. 18 at 17, 18), is
24 unsupported by the record. An independent review of the medical
25 evidence reveals one reference to generalized anxiety disorder with
26 depression due to an inability to work on April 13, 2006. (Tr.
27 408.) The purported diagnosis was noted by David Tuning, PA-C, (Tr.
28 408) who, under the Regulations, is not qualified to make a medical

1 diagnosis. 20 C.F.R. § 404.1513 (a) and (d).⁴ Further, there is no
2 objective medical evidence to establish depression or anxiety
3 disorder. In addition, the ALJ specifically asked Plaintiff at the
4 hearing, in July 2008, if he were being treated for the
5 psychological problems noted in April 2006, and Plaintiff responded
6 he had been given some samples of medication but had not received
7 further mental health treatment. (Tr. 452, 459.) The lack of a
8 medical diagnosis from an acceptable medical source and Plaintiff's
9 unambiguous testimony that he has not sought treatment do not favor
10 Plaintiff in his claim of severe mental impairments. The ALJ did
11 not have a duty to obtain additional psychological evidence or
12 testing and did not err in his step two finding of non-severe mental
13 impairments.

14 **2. Sleep Apnea**

15 Although Plaintiff does not identify medical evidence that
16 supports a finding of severe sleep apnea, the record shows that in
17 2002, Plaintiff's physician recommended a sleep study. (Tr. 146-
18 47.) The record does not include results from such a study, and
19 Plaintiff testified he was unable to tolerate a sleep evaluation.
20 (Tr. 446.) As is the case with the allegations of severe mental
21 impairments, the statements of Plaintiff and Ms. Lemley are
22 insufficient to establish an impairment. Further, treatment records
23 from the alleged onset date to the time of the hearing do not

24
25 ⁴ Only a diagnosis from an acceptable medical source, e.g., a
26 licensed physician or psychologist, can establish a medically
27 determinable impairment. *Nguyen*, 100 F.3d at 1467; *SSR 06-03p*. See
28 *infra* at Section D.2. for a discussion of Mr. Tuning's opinions.

1 mention significant sleep problems or assess a sleep disorder, and
2 Plaintiff does not report medication for sleep problems. (Tr. 81.)
3 Plaintiff did not meet his burden at step two, and there is no
4 evidence in the record that would trigger the ALJ's duty to develop
5 the record in regards to sleep apnea.

6 **D. Evaluation of Medical Provider Opinions**

7 Plaintiff contends the ALJ erred in rejecting the opinions of
8 Robert Egan, M.D., Plaintiff's eye specialist; Wayne Clark, M.D., a
9 neurologist at the Oregon Health and Science University; and David
10 Tuning, Plaintiff's treating physician's assistant (PA-C).
11 Specifically, Plaintiff asserts the ALJ erred in his evaluation of
12 Dr. Egan's opinion that he is "permanently disabled," and Dr.
13 Clark's opinion that his significant vision loss limits his
14 activities and would be problematic in employment that involves
15 eyesight. Plaintiff also argues Mr. Tuning's disability opinion was
16 improperly rejected. (Ct. Rec. 18 at 15-16.)

17 **1. Acceptable Medical Sources**

18 The Regulations distinguish among the opinions of three types
19 of acceptable medical sources: (1) sources who have treated the
20 claimant; (2) sources who have examined the claimant; and (3)
21 sources who have neither examined nor treated the claimant, but
22 express their opinion based upon a review of the claimant's medical
23 records. 20 C.F.R. § 404.1527. A treating physician's opinion
24 carries more weight than an examining physician's, and an examining
25 physician's opinion carries more weight than a non-examining
26 reviewing or consulting physician's opinion. *Benecke v. Barnhart*,
27 379 F.3d 587, 592 (9th Cir. 2004); *Lester v. Chater*, 81 F.3d 821,
28 830 (9th Cir. 1995), "As is the case with the opinion of a treating

1 physician, the Commissioner must provide 'clear and convincing'
2 reasons for rejecting the uncontradicted opinion of an examining
3 physician." *Lester*, 81 F.3d at 830 (*citation omitted*). If the
4 opinion is contradicted, it can only be rejected for "specific" and
5 "legitimate" reasons that are supported by substantial evidence in
6 the record. *Andrews*, 53 F.3d at 1043.

7 Historically, the courts have recognized conflicting medical
8 evidence, the absence of regular medical treatment during the
9 alleged period of disability, and the lack of medical support for
10 doctors' reports based substantially on a claimant's subjective
11 complaints of pain as specific, legitimate reasons for disregarding
12 a treating or examining physician's opinion. *Flaten v. Secretary of*
13 *Health and Human Servs.*, 44 F.3d 1453, 1463-64 (9th Cir. 1995); *Fair*,
14 885 F.2d at 604.

15 Drs. Egan and Clark are acceptable medical sources under the
16 Regulations. As discussed above, their opinions must be rejected
17 with "clear and convincing" reasons if uncontradicted.⁵ The record

18 _____
19 ⁵ Dr. Egan's opinion that Plaintiff is "permanently disabled"
20 is contradicted by a non-examining agency physician who found
21 Plaintiff had no exertional limitations, no neurological defects,
22 right eye vision loss and a normal left eye. (Tr. 385-92.) However,
23 the ALJ rejected the non-examining agency physician's opinion
24 because evidence of Plaintiff's diagnosed obesity and history of
25 back pain did not support the exertional RFC. (Tr. 17.) Also, in
26 December 2005, examining physician James Ogden, doctor of optometry,
27 contradicted Dr. Egan. In a letter to the Division of Disability
28 Determination Services, Dr. Ogden stated Plaintiff's right eye had

1 shows Dr. Egan wrote a one paragraph letter. "To whom it may
2 concern," dated May 26, 2005, stating that Plaintiff was
3 "permanently disabled from driving and work due to a severe visual
4 field defect." (Tr. 267, 271, 274, 283.) Another letter dated the
5 same day from Dr. Egan to Dr. Clark discusses in detail Dr. Egan's
6 findings from a follow-up eye exam after Plaintiff's stroke in
7 February 2005. Dr. Egan stated Plaintiff's visual field defects
8 "leave[] him indefinitely disabled from his work as a sanitation
9 truck driver." (Tr. 269, 273.) (*Emphasis added.*) Functional vision
10 loss was assessed in the right eye (OD vision 20/200), and the left
11 eye (OS) examination showed 20/20 corrected visual acuity. (*Id.*)
12 Further, at the hearing, Plaintiff testified he could read and write
13 and drive in the daylight; he reported he watched television, helped
14 with household chores, and liked to fish. He avoided cooking and
15 could not do a jig-saw puzzle. (Tr. 452-54.) Consistent with Dr.
16 Egan's letter to Dr. Clark, Plaintiff stated he had peripheral
17 problems with his left eye. (Tr. 17, 451.)

18 The ALJ reasonably gave little weight Dr. Egan's brief,
19 unexplained opinion letter, in which he concluded Plaintiff was
20 permanently disabled from all work due to his eye condition. *Thomas*,
21 278 F.3d at 957. The ALJ noted the specific opinion being rejected,

22 _____
23 20/200 vision, the left eye retained 20/20 vision with the left
24 visual field impaired and Plaintiff was "partially disabled" but
25 could not be a commercial driver with his eye condition. (Tr.
26 393.) Nonetheless, Dr. Egan is a treating specialist, and the court
27 applies the "clear and convincing" standard to his opinions.
28

1 and cited objective medical evidence and Plaintiff's testimony that
2 contradicted the opinion of permanent disability. (Tr. 17, 267, 268
3 [Ex 7F1].) As found by the ALJ, "While the claimant has experienced
4 a loss of vision in his right eye and loss of peripheral vision, he
5 retains 20/20 vision in his left eye. He continues to drive an
6 automobile. His hobbies include watching television and fishing."
7 (Tr. 17.) Further, as noted above, in Dr. Egan's more detailed
8 letter to Dr. Clark, Dr. Egan clarified the scope of Plaintiff's
9 impairment, stating Plaintiff was "disabled from his work as a
10 sanitation truck driver." (Tr. 17, 269.) This detailed letter is
11 consistent with the objective medical evidence and with the ALJ's
12 step four finding that Plaintiff could not perform his past work.
13 The ALJ's reasoning is "clear and convincing"; and his rejection of
14 the identified letter from Dr. Egan is supported by substantial
15 evidence and free of legal error. *Bayliss v. Barnhart*, 427 F.3d
16 1211, 1216 (9th Cir. 2005)(discrepancy between physician's opinion
17 and notes from same day is a clear and convincing reason not to rely
18 on opinion).

19 In addition, the ALJ properly found Dr. Egan did not consider
20 vocational alternatives available to Plaintiff, and gave no specific
21 limitations that would preclude all work activity. (Tr. 17.) These
22 are specific "clear and convincing" reasons, that are not only
23 supported by other evidence from Dr. Egan, but also recognize that
24 disability, as defined by the Social Security Act, is a
25 determination reserved to the Commissioner after consideration of
26 all the evidence in the record, including reliable vocational
27 evidence. SSR 96-5p. The ALJ did not err in rejecting Dr. Egan's
28 conclusory opinion that Plaintiff was "permanently disabled from

1 driving and work."

2 Plaintiff also argues Dr. Clark's opinions expressed in an
3 April 2005 treatment note were "implicitly rejected." (Ct. Rec. 18
4 at 16.) An ALJ need not discuss all evidence presented, and is
5 required only to specifically explain the rejection of "substantial
6 probative evidence." *Vincent v. Heckler*, 739, F.2d 1393, 1394-95
7 (9th Cir. 1993). An independent review of the record shows Dr.
8 Clark's notes were made on April 1, 2005, less than two months after
9 Plaintiff's cardiovascular accident and resultant vision problems.
10 (Tr. 308, 317, 319.) Dr. Clark noted on examination that
11 Plaintiff's "only remaining good vision is the right visual field
12 from his left eye." He assessed Plaintiff was "currently unsafe to
13 drive." (Tr. 308.) He also opined Plaintiff's employment ability
14 was limited "in that he was previously a sanitary driver for a
15 garbage company" and "employment that involves eyesight would be
16 problematic." (*Id.*) Dr. Clark did not opine Plaintiff was
17 permanently disabled after his stroke. Consistent with the record
18 in its entirety, the ALJ found Plaintiff had reduced acuity in his
19 right eye, was limited in depth perception, had limited peripheral
20 vision in his left eye, and was restricted to daytime driving. He
21 also found Plaintiff was not able to work as a truck driver. These
22 limitations are substantially consistent with Dr. Clark's
23 assessment; therefore, the ALJ did not need to reject Dr. Clark's
24 opinions.

25 **2. "Other source" Opinions**

26 Mr. Tuning is not an acceptable medical source and, therefore,
27 the standards discussed above do not apply to him. However, as a
28 physician's assistant, Mr. Tuning is considered an "other source"

1 under the Regulations. 20 C.F.R. §§ 404.1513(d). While only an
2 acceptable medical source can establish a diagnosis or disability,
3 *Nguyen*, 100 F.3d at 1467, the ALJ is required to consider
4 observations by health care providers as to the effects of
5 impairments on a claimant's ability to work. SSR 06-03p. Pursuant
6 to *Dodrill*, 12 F.3d at 919, an ALJ is obligated to give reasons
7 "germane" to "other source" testimony before discounting it. The
8 Commissioner has ruled that weight given to health care
9 professionals opinions must be evaluated on the basis of certain
10 factors, e.g., their professional qualifications, how consistent
11 their opinions are with the other evidence, the amount of evidence
12 provided in support of their opinions, whether the other source
13 opinion is well explained, and whether the other source "has a
14 specialty or area of expertise related to the individual's
15 impairment." SSR 06-03p. Nonetheless, only an acceptable medical
16 source can establish an impairment.

17 Here Plaintiff appears to object to the ALJ's rejection of a
18 specific treatment note by Mr. Tuning, dated February 22, 2008, in
19 which Mr. Tuning stated Plaintiff was "certainly disabled and
20 limited in his ability to work."⁶ (Ct. Rec. 18 at 15; Tr. 17.) The
21 ALJ gave the following reasons for giving this opinion little

22
23 ⁶ There is also a letter from Mr. Tuning, dated May 25, 2005,
24 requesting an extension of short term disability, and indicating
25 Plaintiff would not be able to return to his work as a truck driver
26 due to his poor vision. (Tr. 167.) The ALJ was not required to
27 reject this opinion as it is consistent with step four findings.
28 (Tr. 17.)

1 weight: it was vague, there was no objective evidence to support the
2 opinion, Mr. Tuning did not define disability, and he relied on
3 Plaintiff's subjective complaints, which as discussed above were
4 found not entirely credible. (Tr. 17.) These are specific, germane
5 reasons for rejecting "other source" opinions. Further, the
6 relevant factors do not weigh in favor of assigning Mr. Tuning's
7 opinion additional weight. Although he is a treating health care
8 provider, under the Regulations Mr. Tuning is not qualified to make
9 a diagnosis or determine disability as defined by the Social
10 Security Act. Further, his opinion is unexplained by treatment
11 notes, and unsupported by objective reports from the eye and
12 neurology specialists who considered Plaintiff unable to perform his
13 past relevant work, but retained good visual acuity in his left eye.
14 Finally, the record includes reports of Plaintiff's activities and
15 testimony (discussed above) that are not consistent with permanent
16 disability. The ALJ's rejection of Mr. Tuning's treatment note is
17 without legal error and supported by substantial evidence.

18 **E. Step Five**

19 Plaintiff argues the Commissioner did not meet his burden at
20 step five, contending that he cannot perform the jobs identified by
21 the vocational expert with the limitations supported by the record.
22 (Ct. Rec. 18 at 19.) Specifically, he argues the hypothetical
23 individual presented to and relied upon by the vocational expert at
24 the hearing did not take into account his vision deficits. (*Id.* at
25 20.) This argument is unsupported by the record.

26 An ALJ may rely on vocational expert testimony if the
27 hypothetical presented to the expert includes all functional
28 limitations supported by the record and found credible by the ALJ.

1 Bayliss, 427 F.3d at 1217. The hearing transcript shows the ALJ
2 described in detail the vision limitations found in the medical
3 records:

4 [T]he record indicates he - his right eye is - they call
5 it counting fingers, very limited vision in his right eye
6 anyway. His left eye has apparently good vision, although
7 apparently there's a limited field of vision with little
8 peripheral vision with the left eye. So I'll say limited
depth perception because of the one eye - essentially one
eye vision. He's limited to driving only during the
daytime hours, yet wouldn't be able to see out of the
corner of his eyes, things coming up from the side.

9 (Tr. 468-69.)

10 As reported by Dr. Egan, Plaintiff's visual acuity with
11 correction in his left eye is 20/20. In addition, the ALJ properly
12 found Plaintiff's allegations regarding the severity of his visual
13 limitations were not consistent with activities Plaintiff reported.

14 (Tr. 16.) Further, based on the specific visual limitations
15 presented by the ALJ, the VE testified Plaintiff could perform two
16 sedentary jobs: packing line worker and small products assembler.

17 (Tr. 470.) The *Dictionary of Occupational Titles (DICOT)*, (4th ed.,
18 revised 1991)⁷ supports the VE's testimony. The jobs identified by
19 *DICOT* number at the hearing indicate requirements of occasional or
20 frequent near acuity and no requirement of far acuity, depth
21 perception, color vision or field of vision. *DICOT* 731.685-014;
22 713.687-027. The ALJ's hypothetical was not deficient; therefore,
23 the VE testimony is substantial evidence that supports the ALJ's

24
25 ⁷ At step five, the Commissioner may take judicial notice of
26 information in the *DICOT* as reliable evidence in assessing work
27 requirements of jobs in the national economy. 20 C.F.R. §
28 404.1566(d); SSR 00-4p.

1 step five findings. Where, as here, the ALJ's findings are based on
2 a rational interpretation of substantial evidence, the
3 Commissioner's determination will not be disturbed.

4 **CONCLUSION**

5 The ALJ's determination of disability is free of legal error
6 and supported by substantial evidence. Accordingly,

7 **IT IS ORDERED:**

8 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 17**) is
9 **DENIED;**

10 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 22**) is
11 **GRANTED;**

12 The District Court Executive is directed to file this Order and
13 provide a copy to counsel for Plaintiff and Defendant. Judgment
14 shall be entered for Defendant and the file closed.

15 DATED October 22, 2009.

16
17 S/ CYNTHIA IMBROGNO
18 UNITED STATES MAGISTRATE JUDGE
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